UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

RHCG SAFETY CORP.

And **Cases 29-CA-161261**
29-RC-157827

CONSTRUCTION & GENERAL BUILDING LABORERS, LOCAL 79, LIUNA

Erin C. Shaeffer Esq., for the General Counsel.
David A. Tango Esq. and *Aaron C. Carter Esq*., counsel for the Respondent.
Tamir Rosenblum Esq., counsel for the Union.

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on various days in March and April 2016.

The petition in 29–RC–157827 was filed on August 12, 2015. Pursuant to a Stipulated Election Agreement approved by the Regional Director on August 27, an election was conducted on September 18, 2015. The agreed upon voting unit was as follows:

> Including all full-time and regular part-time demolition workers.
> Excluding all other employees, including concrete workers, clerical and professional employees, guards and supervisors as defined in the Act.

In the election, the challenges were sufficient in number to affect the outcome. As a result, a hearing was conducted before a hearing officer designated by the Regional Director and a report was issued on November 13, 2015. The Regional Director thereafter issued a Supplemental Decision on Challenged Ballots wherein he ordered that 20 of the challenged ballots be opened and counted and that 9 challenges be sustained. On January 27, 2016, a revised tally of ballots was issued and this showed that the challenged ballots were still sufficient in number to affect the outcome of the election.

In the meantime, both the Union and the Employer filed objections to the election.

The Union filed the unfair labor practice charge in 29–CA–161261 on October 2, 2015. This charge was amended on November 30, 2015. On December 18, 2015, the Regional Director issued a complaint in the unfair labor practice case and this alleged in substance;

1. That by a text message on July 30, 2015, the Respondent interrogated Claudio Anderson about his union activities.

2. That on or about July 30, 2015, the Respondent for discriminatory reasons, terminated Claudio Anderson.

3. That in September 2015, the Respondent threatened employees with job loss if they selected the Union as their representative.

4. That in September 2015, the Respondent threatened employees with a reduction in pay if they selected the Union as their representative.

On February 17, 2016, the Regional Director issued a Supplemental Decision on challenged ballots and Objections. At the same time, he issued an Order consolidating 29–RC–157827 with 29–CA–161261. In this report, the Regional Director overruled some of the objections and ordered that a hearing be conducted as to others. Inasmuch as the Company, on March 22, 2016, withdrew its objections, the remaining objections were litigated.

During the hearing, the Union and the Employer stipulated to the eligibility of 22 of the challenged ballots. I thereupon ordered that those ballots be opened and counted. I also concluded that the ballot of Padilla should not be counted because the evidence clearly showed that he had been terminated for nondiscriminatory reasons before the date of the election.

On March 21, the ballots of 22 individuals were opened and counted. But this did not result in a determinative vote. Thereafter, on March 22, the Union and the Employer stipulated that an additional 4 challenged ballots should be opened. When these ballots were opened and counted this resulted in the issuance of a fourth talley of ballots that showed that 36 votes were cast for the Union; 46 votes were cast against union representation; and that the number of undetermined challenged ballots now numbered seven. Because the challenges were no longer determinative and a majority of the valid votes were cast against union representation, the employer withdrew its objections to the election.

Findings and Conclusions

I Jurisdiction

It is agreed by all parties and I find that RHCG Safety Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. There is also no dispute that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II Alleged unfair labor practices

The employer is engaged in construction work and its employees generally work in the field instead of at a home facility. It has two facilities, one at 83 Main Street, Bay Shore, New York, and the other at 112 12th Street, Brooklyn, New York. At times the Respondent has been referred to as Red Hook or Red Hook Safety Corp. Basically, the company is divided into two divisions, one doing demolition work and the other doing concrete work. Christopher Garofalo is the vice president of operations who oversees the demolition division. Tommy Frangipane is the vice president of operations and he oversees the concrete division. Each division utilizes supervisors who have the authority to discharge employees and to effectively recommend hiring.

The alleged discriminatee, Claudio Anderson, became an employee in August 2014 and worked in the concrete division. In this regard, it is noted that Union, which commenced its organizing efforts in August 2015, focused its attention on the demolition workers and not on the employees who worked in the concrete division. During 2015, Anderson worked at a number of construction sites under the supervision of David Scherrer, who in turn worked under the direction of Frangipane. The last job site that Anderson worked on was at 2301 Tillotson Avenue, Bronx New York.

In July 2015, while working at the Tillotson site, Anderson requested an extended period of time to visit his mother in Panama. This request was granted by Scherrer.

Soon thereafter, Anderson visited the offices of the Union and among other things signed a union authorization card. Also present at the Union's office were some other employees of the Respondent.

Before leaving for Panama, Anderson's mother called to tell him that he didn't need to come after all. As a result, Anderson and Scherrer communicated with each other via a series of text messages about his return to work between July 30 and August 4, 2015.

With respect to these text messages, Anderson could not produce his phone as he testified that about 5 days before this trial started, he gave his phone to his sister in Panama. When directed to get the phone back, the General Counsel and the Charging Party's counsel thereafter advised me that the phone's text messages had been deleted when Anderson's sister registered the phone with her own carrier. They therefore conceded that if the phone was examined, it would not show the text messages. This began to sound like the Tom Brady story. (The quarterback for the Boston Patriots).

Nevertheless, phone records confirmed that a series of text messages were transmitted between Anderson's cell phone and the cell phone of Scherrer between July 30 and August 4. This contradicts the testimony of Scherrer who stated that he did not send or receive text messages with Anderson during this period.

Anderson testified that some time after his discharge, he notified the Union about his firing and was asked if he had any proof of discrimination. He then took screen shots of the messages with Scherrer and these were ultimately transmitted by the Union to the NLRB agent who was investigating this charge.

Given the entirety of the evidence, including the fact that the phone records show that the text messages were sent not only on the same dates but at the same times listed on the messages, I conclude that the text messages that were transmitted by Anderson to the Union were authentic even though they were not retained on his own phone.[1] The messages were as follows:

From Anderson July 30, 8:01 am
Sorry David I thing today is Friday

[1] The Respondent filed a petition to exclude these messages on the ground that they were not complete. That may be so, but I am convinced that they are authentic and therefore are admissible. Accordingly, I deny the Respondent's petition

From Anderson July 30, 4:11 pm
Hi david I can work tomorrow and Saturday?

From David July 30 8:36 pm
What's going on with u?
U working for Redhook or u working in the union? [2]

From David July 30 11:04 pm
U got to tell me what's going on

From Anderson reply
I was there to talk you today but you left

From Anderson August 1 6:38 pm
Hi david I can star work Monday whit you?

From Anderson August 2 10:16 pm
Hi David I can star work tomorrow?

From David reply
No right now! I filled your spot come meet me tomorrow
Not right now

From Anderson August 2, 10:25 p.m.
What time

From Anderson August 4 9:31 am
Hi david good morning what chris said?

On or about August 4, Anderson visited the Tillotson Avenue job site and spoke to Scherrer who told him that there was no work for him. According to the credited testimony of Anderson, Scherrer then told him to speak with Nick Rodriguez who is a nonsupervisory employee who is often used by the company to convey messages to Spanish speaking employees. When Anderson asked why he couldn't work, Rodriguez told him that Garofalo said that Anderson and some other guys could not work for the company anymore. Anderson reasonably took this to mean that he was fired.

In my opinion, the evidence shows, contrary to the Respondent's defense, that Anderson was indeed discharged. The series of text messages show that Scherrer was not putting him to work and when Anderson visited the jobsite on August 4, he was told that there was no work for him. The icing on the cake was when Nick Rodriguez told him that the boss didn't want him working for the company anymore. And even though Rodriguez cannot be considered to be a supervisor, it was shown that he acts as a messenger between the company and the Spanish speaking employees and that he has been used to transmit notifications of termination. The text messages also show that the reason for Anderson's discharge was the company's belief that he was becoming involved with the Union.

[2] As previously noted, the company is sometimes referred to as Red Hook.

Based on the above, I find that Anderson was discharged in violation of Section 8(a)(1) & (3) of the Act. I also conclude that by asking him if he was working for the Union or for the company, the Respondent illegally interrogated him in violation of Section 8(a)(1) of the Act.

As noted above, the Union filed its election petition on August 12, 2015. In response, the company, with the advice of counsel, held a series of meetings with employees before the election. It also distributed a series of leaflets at the meetings. These meetings, on three separate dates, were conducted by Garofalo at the various job sites. He was instructed to follow the scripts that are essentially contained in the written documents that were passed out to employees.[3] When Garofalo needed to communicate with Spanish speaking employees, he utilized the translator services of an office employee named Gabriella.

Out of about 80 plus employees, the General Counsel produced two employees who testified about statements allegedly made by Garofalo at two separate meetings.

Raymondo Garcia testified that Garofalo through Gabriella, said that there was no work in Local 79 and that in Local 79 there were a lot of people who don't work.

Lauro Padilla testified that Garofalo said that if the company won, he was going to give employees benefits and vacations and that if Local 79 loses, they were going to reduce employee salaries.

Neither of these assertions was corroborated by any other persons who attended these meetings.

As to the testimony of Garcia, Garofalo stated that in the course of his speech he did mention that there were many members of Local 79 who were not working whereas his employees were working. To me this is simply making a comparison between the work opportunities available to members of Local 79 in the industry at large as compared to the amount of work that the Respondent has made available to its own employees. I do not construe this as a threat of job loss. In addition, I credit Garofalo's assertion that he neither made any promise of benefits nor made any threats of benefit loss in relation to the election. I shall therefore recommend that these allegations of the complaint be dismissed.

III The Objections

The evidence shows that the Respondent failed to provide an adequate Excelsior list. And based on this failure and the fact that the election was relatively close, I conclude that this objection should be sustained and that the election should be set aside.

Pursuant to *Excelsior Underwear*, 156 NLRB 1236 (1996), an employer in a Board conducted election, is required to file with the Regional Director a list of the names and addresses of all eligible voters within 7 days after either the approval of an election agreement or the issuance of Decision and Direction of Election.[4] The purpose of this rule is to provide the petitioning union an opportunity to communicate with eligible voters before the election. The failure to provide such a list or the submission of a substantially erroneous list is grounds for

[3] In this regard, there is no allegation that anything contained in these leaflets violated the Act.
[4] In *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969), the Supreme Court upheld the validity of the Excelsior rule when it stated that the "objections that the respondent raises to the requirement of disclosure were clearly and correctly answered by the Board in its Excelsior decision."

setting aside the election. *George Washington University*, 346 NLRB 155 (2005); *Sonfarrel, Inc*., 188 NLRB 969 (1971); *Ponce Television Corp*., 192 NLRB 115, 116 (1971).

The Stipulated Election Agreement required the company to submit to the Region for transmittal to the Union, a list of its employees with their home addresses, phone numbers and e-mail addresses. This was agreed to by the employer. The list that was submitted contained about 84 names and addresses. However, 80 of the addresses were not correct and the Union placed into evidence a group of 26 envelopes that were returned by the Post Office. Also, a union representative testified that when she and others went to make home visits, the employees were not at the addresses on the Excelsior list.

Additionally, the list did not contain *any* phone numbers or email addresses, notwithstanding evidence that the company's supervisors maintained and utilized employee phone numbers on their own cell phones.

Finally, the submitted list did not contain the names of any former employees who worked for sufficient periods of time in the prior 2 years to make them eligible voters under what is called the Steiny-Daniels formula.[5] Thus, it is probable that the submitted Excelsior list omitted an entire category of employees who might have been eligible voters if they had been aware of the election.

The Union also alleges other conduct in support of its position that the election should be set aside. As I have concluded that the election should be set aside based on the employer's failure to provide an accurate and adequate Excelsior list, I need not deal with the other objections.

Conclusions of Law

1. By interrogating employees about their union activities, the Respondent has violated Section 8(a)(1) of the Act.

2. By discharging Claudio Anderson because of his union activities, the Respondent has violated Section 8(a)(1) & (3) of the Act.

3. The unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

4. The Union's Objections regarding the failure to submit an accurate and adequate Excelsior list are sustained.

5. The conduct found to be objectionable is sufficiently serious to set aside the election and to hold a new one.

[5] In the Stipulated Election Agreement, the parties agreed that demolition employees who have been employed for a total of 30 working days or more within 12 months immediately preceding the eligibility date or who have been employed 45 days or more within the 24 months immediately preceding the election eligibility date, would be eligible to vote. Citing *Daniel Construction Co*., 133 NLRB 264, 267 (1961), as modified by 167 NLRB 1078 (1967), and *Steiny & Co*., 308 NLRB 1323 (1992).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondent unlawfully discharged Claudio Anderson, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges and to notify the employee in writing that this has been done and that the unlawful discharges will not be used against him in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the employee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year. *Don Chavas, d/b/a Tortillas Dan Chavas*, 361 NLRB No. 10 (2014).

In addition to the above, the General Counsel seeks a remedy that would require the Respondent to reimburse Anderson for any expenses incurred while seeking interim employment. Although I can see the appropriateness of such a remedy, this is not the current law, which treats such expenses as an offset to a discriminatee's interim earning. As the General Counsel is asking that the Board change its current view of the law, I leave it to the Board to make any changes it sees fit.

Finally, as many of these employees speak Spanish as their first language, the Notice should be in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [6]

ORDER

The Respondent, RHCG Safety Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of Construction & General Building Laborers, Local 79 or any other labor organization.

(b) Interrogating employees about their union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Claudio Anderson, full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Claudio Anderson and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Brooklyn and Bay Shore, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 29–RC–157827 be remanded to the Regional Director and that the election held on September 18, 2015, be set aside and that a new election be scheduled.

Dated, Washington, D.C. May 18, 2016

Raymond P. Green
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their membership in or activities on behalf of Construction & General Building Laborers, Local 79 or any other labor organization.

WE WILL NOT interrogate employees about their union activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed to them by Section 7 of the Act.

RHCG Safety Corp

_____

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center
Jay Street and Myrtle Avenue
Brooklyn, NY 11201-4201
718-330-2862. Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-161261 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.